

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	8:04CR164-7
)	
v.)	
)	
PEDRO MORALES,)	MEMORANDUM
)	AND ORDER
Defendant.)	
)	

Pending before me is a frivolous § 2255 motion. It will be denied with prejudice because the files and records conclusively show that the defendant is not entitled to relief.

First, the defendant did not appeal his conviction after the entry of a guilty plea and judgment was rendered on August 18, 2010. (Filing no. [380](#).) The defendant had one year and 10 days to file his motion. *See, e.g., Never Misses A Shot v. United States*, 413 F.3d 781, 782 (8th Cir. 2005). His motion was not filed until September 15, 2011. (Filing no. [382](#).) The motion was not presented to the postal service until September 13, 2011. (*Id.* (envelope).) While the motion purports to have been dated on July 21, 2011, and recognizing that the defendant is entitled to the “prison mail box rule,” there is no showing that the motion was deposited with the prison in a timely fashion or that there is some reason to invoke equitable tolling principles. Accordingly, the motion must be denied because it is not timely under the provisions of 28 U.S.C. § 2255(f)(1).

Second, the claim that counsel was ineffective for failing to challenge the grand jury under Federal Rule of Criminal Procedure 6 has no merit. Initially, the defendant gives no concrete reason to believe that Rule 6 was violated. Moreover, there is no reason to believe that the alleged failure to challenge the grand jury resulted in

prejudice to the defendant particularly given the fact that the defendant entered a guilty plea and thus waived many, if not all, Rule 6 arguments.

Accordingly,

IT IS ORDERED that the Motion to Vacate under 28 U.S.C. § 2255 (filing no. [382](#)) is denied. A separate judgment will be issued.

DATED this 26th day of September, 2011.

BY THE COURT:

Richard G. Kopf
United States District Judge